

1 Abe G. Salen (SBN 182366)
2 Email: Abe.Salen@wolfffirm.com
3 THE WOLF FIRM, A Law Corporation
4 2955 Main Street, Second Floor
5 Irvine, CA 92614
6 Telephone: (949) 720-9200
7 Fax: (949) 608-0129

5 Attorneys for Defendant
THE WOLF FIRM, A Law Corporation, erroneously
6 sued herein as THE WOLF LAW FIRM, A Law Corporation

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

11 VICTORIA A. AMELINA, an individual;
12 and A.A.;D.S.; and B.S., each individuals
and minors by and through their Guardian
Ad Litem, Victoria A. Amelina.

13 | Plaintiffs.

14 | vs.

15 MANUFACTURERS and TRADERS
16 TRUST COMPANY aka M&T BANK,
17 SAFEGUARD PROPERTIES, LC and
THE WOLF LAW FIRM, A Law
Corporation,

18 | Defendants.

Case No.: 3:14-CV1906-WQH-NLS

Assigned for all Purposes to:
The Honorable William Q. Hayes

**REPLY BRIEF OF DEFENDANT THE
WOLF FIRM IN SUPPORT OF ITS MOTION
TO DISMISS PLAINTIFFS' THIRD
AMENDED COMPLAINT**

DATE: March 21, 2016
TIME: N/A
CTRM: 14B

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

Complaint Filed : August 13, 2014
Trial Date : None Set

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. ARGUMENT**

3 **A. The Wolf Firm's Principal Business Purpose Is Not, and**

4 **Has Never Been, the Collection of Debts.**

5 Plaintiffs must allege that Wolf is a "debt collector" under Section
p 6 1692a(6) and, at the time, was acting in its capacity as a debt collector
p 7 when it communicated with plaintiffs in 2014. Plaintiff Victoria Amelina
p 8 (the only party suing Wolf and, hereafter "plaintiff") substantiates this
p 9 position by alleging in her TAC that: (1) Wolf's website identifies that one
p 10 of its services is collection; (2) in this instance, Wolf placed a disclaimer
p 11 on its foreclosure-related communications with Plaintiff Amelina that it
p 12 was acting "as a debt collector attempting to collect a debt;" and (3) in
p 13 the past, it has been sued for violation of both the FDCPA and RFDCPA,
p 14 its principal business purpose must be the collection of debt.
p 15

16 However, plaintiff's allegations still remain insufficient to allege
p 17 that Wolf's *principal* business purpose is the collection of debt. As
p 18 discussed in its last motion to dismiss, and as *Schlegel v. Wells Fargo*
p 19 *Bank, NA*, 720 F.3d 1204, 1209 (9th Cir. 2012) aptly discussed, "these
p 20 allegations do not infer that the principal purpose of [Wolf's] business is
p 21 debt collection."

22 Plaintiff alleges that Wolf's website identifies it as a collection firm
p 23 and even maintains a separate contact fax and email address for the
p 24 Collections Department. [Doc. No. 65, ¶42.] This, allegation, in itself,
p 25 concedes that Wolf may have other departments.

26 Indeed, in the very next allegation, plaintiff alleges that "Wolf
p 27 advertises itself as being a law firm that has, for over twenty-five years,
p 28 regularly 'provided a broad array of legal and related services

1 throughout California and nationally to lenders, servicers, investors,
 2 governmental agencies and other members of the financial services
 3 community' through 'cradle-to-grave services' that include 'Collection,
 4 Replevin/Claim and Delivery,' all regulated debt collection practices
 5 under the FDCPA and California's Rosenthal Act." [Doc. No. 65, ¶43.]
 6 Again, however, these allegations do not sufficiently allege that Wolf's
 7 *principal* business purpose is the collection of debt; rather, it merely
 8 indicates that a portion of its business is the collection of debt. While not
 9 before the court, it should also be noted that the quoted language is
 10 taken out of context from Wolf's website.

11 **B. Wolf does not regularly collect debt on behalf of others.**

12 Plaintiff also alleges in conclusory nature that Wolf "regularly and
 13 directly collects or attempts to collect debts owed or due another by
 14 accepting for collection defaulted residential loans." [Doc. No. 65, ¶37.]
 15 But, in the very next paragraph, plaintiff alleges that Wolf "... *on behalf*
 16 *of themselves*, engages in debt collection through acts and practices in
 17 connection with the collection of consumer debts ..." [Emphasis added.]
 18 [Doc. No. 65, ¶38.]

19 More important to the allegations at hand, however, is that plaintiff
 20 infers that Wolf's conduct as a foreclosure trustee should be deemed
 21 debt collection activity. However, Plaintiff fails to sufficiently allege that
 22 Wolf regularly performs other non-judicially related collection activity for
 23 others.

24 Rather, as aptly stated by this Court in its prior Orders [Doc. Nos.
 25 35 and 57], as well as by Wolf in its moving papers, non-judicial (or
 26 judicial) activities fall outside the scope of the FDCPA (and, ergo, the
 27 RFDCPA). See *Izenberg v. ETS Services, LLC*, 589 F.Supp.2d 1193,
 28 1199 (C.D. Cal. 2008); *Natividad v. Wells Fargo Bank, NA*, Case No.

1 3:12-cv-03646 JSC (N.D. Cal. May 24, 2013) [Wolf's moving papers.]
 2 And, see *Diessner v. Mortgage Electronic Registration Systems, et al,*
 3 618 F.Supp.2d 1184, 1188-1189 (D. Ari. 2009).

4 **C. Wolf's Conduct In This Instance Related Solely To Its**
 5 **Duties and Obligations Related to the Non-judicial Foreclosure**
 6 **Process.**

7 Plaintiff contends in her Opposition that Wolf's conduct went
 8 beyond its activities necessary to conduct the instant non-judicial
 9 foreclosure process pertaining to Plaintiff and her property. Plaintiff
 10 argues that, where conduct "goes beyond the statutorily mandated
 11 communications required for foreclosure, may be considered debt
 12 collectors." *Natividad v. Wells Fargo Bank, N.A.* 2013 U.S. Dist. LEXIS
 13 74067, *28 (N.D. Cal. May 24, 2013). [Doc. 70, 10:5-8.]

14 Plaintiff cites to *Memmott v. Newest Bank, FSB*, 2013 U.S. Dist.
 15 LEXIS 185388 (D. Or. Dec. 20, 2013) for the proposition that a collection
 16 letter sent during the foreclosure process but not necessary to the
 17 foreclosure, qualified as a collection effort. *Memmott*, * 13-14.

18 However, plaintiff takes the citation out of context. In *Memmott*,
 19 plaintiffs had been offered a Trial Period Plan ("TPP") as a precursor to
 20 a modification arrangement. After plaintiffs submitted their third
 21 payment, the bank sent them correspondence, including plaintiffs' check
 22 for the third payment, and indicated that the amount did not cover the full
 23 amount due at that time. The letter further indicated "Please contact our
 24 office immediately for the amount required to bring your loan current." A
 25 disclaimer stating that, "For certain loans we service, we are required by
 26 federal law to inform borrowers that we are attempting to collect a debt
 27 and any information obtained will be used for that purpose." The
 28 *Memmott* court held that, in this instance, the communication was not

1 "necessary to effectuate foreclosure" and, thus, was not covered by the
 2 rule of *Hulse*. *Id.*, at *14.

3 Indeed, the letter in *Memmott* had nothing to do with the non-
 4 judicial foreclosure activities, but was sent by the servicer in relationship
 5 to the outstanding loan, and what was presently due. It was not sent
 6 along with any foreclosure-related communications or otherwise did it
 7 reference foreclosure.

8 In the present case, the April 28, 2014, letter plaintiff alleges went
 9 beyond the foreclosure process was, in fact, delivered as part of the
 10 initiation of the foreclosure process. Indeed, plaintiff concedes that it
 11 was delivered via the mail in conjunction with a Notice of Default and
 12 Election to Sell Under Deed of Trust, and a letter from M&T Bank
 13 regarding foreclosure prevention alternatives. Both the April 28th letter
 14 and the M&T Bank letter explicitly confirm that non-judicial foreclosure
 15 proceedings had been initiated – as further exhibited by the attached
 16 Notice of Default. [Doc. 65-7, subdocs A and B]

17 The other cases cited by plaintiff in her opposition are critical of
 18 *Hulse*, and disagree with its position that foreclosure-related activity is
 19 not considered debt collection under the FDCPA. However, most
 20 Districts in the Ninth Circuit, including the Southern District of California,
 21 repeatedly have held that conduct related to non-judicial foreclosure
 22 activities fall outside the FDCPA (and, thus, the RFDCPA). *Pratap v.*
 23 *Wells Fargo Bank, N.A.*, No. 12-CV-06378-MEJ, 2014 WL 3884413, *9
 24 (N.D. Cal. Aug. 7, 2014); *Izenberg v. ETS Servs., LLC*, supra, 589
 25 F.Supp.2d, 1193, 1199; *Putkkuri v. Recontrust Company*, No. 08cv1919
 26 WQH (S.D. Cal. Jan. 5, 2009); *Lobato v. Acqua Loan Services*, No.
 27 11cv2601 WQH (S.D. Cal. Feb. 23, 2012); and, recently, *Saterbak v.*
 28 *National Default Servicing Corporation*, No. 15cv956-WQH-NLS (S.D.

1 Cal. Oct. 1, 2015), citing *Santoro v. CTC Foreclosure Serv. Corp*, 12
 2 Fed. Appx. 476, *11-12 (9th Cir. 2001).

3 Moreover, as stated in its moving papers, courts in the 9th Circuit
 4 have repeatedly held that letters delivered in conjunction with
 5 foreclosure activities are also exempt from liability under the FDCPA.
 6 *Beckner v. ReconTrust Co., N.A.*, 12-cv-3379-GHK (FFMx), at 4 (C.D.
 7 Cal. Oct. 15, 2012); *Cochran v. Bank of New York Mellon Trust
 Company NA.*, 15-3209-GHK (JCx) (C.D. Cal. Jul. 29, 2015). Indeed,
 9 the *Cochran* court, in citing to *Beckner*, explicitly noted that “Debt
 10 Validation” correspondence relate to foreclosure-related activities:
 11 “dunning letter”, NOD, “Payoff Demand Letter,” and “debt validation
 12 demand letters,” all were “foreclosure collection activities.”; see also,
 13 *Hernandez v. Green Tree Servicing, LLC*, 2:14-cv-01438-CAS (AGRx)
 14 (C.D. Cal. June 9, 2014).

15 Finally, as previously indicated, plaintiff suggests that, since Wolf
 16 has been sued numerous times for FDCPA and RFDCPA violations, it
 17 must be a debt collector in accordance with these statutes. However,
 18 Wolf has not actually been found to be a debt collector in any of these
 19 cases (or that its conduct would have been deemed debt collection):
 20 *Ananiev v. Aurora Loan Services, LLC* (N.D. Cal. 2012); *Puicon v.
 Franklin Credit Management Corporation, et al*, 3:2015cv04449 (N.D.
 22 Cal. 2016).

23 In short, plaintiffs’ TAC against Wolf should be dismissed without
 24 leave to amend.

25
 26
 27
 28

1 2. **CONCLUSION**

2 For the foregoing reasons, plaintiffs' Third Amended Complaint
3 should be dismissed as to defendant Wolf. Plaintiff Amelina fails to
4 allege sufficient facts to substantiate her claim that Wolf's principal
5 business purpose is to conduct itself as a debt collector, or otherwise
6 acted as a debt collector outside its obligations as the foreclosure
7 trustee in this instance. As such, their TAC against Wolf should be
8 dismissed. This is plaintiffs' fourth opportunity to sufficiently allege a
9 cause of action against Wolf, to no avail. Therefore, further leave to
10 amend appears futile. For the same reasons, plaintiffs' RFDCPA cause
11 of action should be dismissed as to Wolf without leave to amend.

12 Thus, Wolf respectfully requests that this court grant its motion
13 with prejudice.

14 Date: March 14, 2016

15 THE WOLF FIRM, A LAW
16 CORPORATION

17 By: /s/ Abe G. Salen
18 Abe G. Salen
19 Attorneys for Defendant
20 THE WOLF FIRM, A Law
Corporation, erroneously sued herein
as THE WOLF LAW FIRM, A Law
Corporation

CERTIFICATE OF SERVICE

I am over the age of eighteen years and not a party to nor interested in the
within action. My business address is 2955 Main Street, Second Floor, Irvine,
California 92614.

A true and correct copy of the foregoing document(s), entitled:

**OPPOSITION OF DEFENDANT THE WOLF FIRM TO PLAINTIFFS' MOTION FOR
LEAVE TO AMEND AND FILE THIRD AMENDED COMPLAINT**

will be served or was served (a) on the judge in chambers in the form and manner required by Local Rule ("LR") 5.4.

- 1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders, the foregoing documents will be served by the Court via NEF and hyperlink to the document. On March 14, 2016, I checked the CM/ECF docket for this matter and determined that the following persons on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated on the attached service list.
- 2. SERVED BY UNITED STATES MAIL:** On March 14, 2016, I served the following persons and/or entities at the last known address in this case by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid and addressed as follows.
- 3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state the method for each person or entity served): Pursuant to F.R.Civ. P. 5 and/or controlling local rules, on xxxxxxxxxxxxxxxx, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the Judge here constitutes a declaration that personal service on overnight mail to, the judge will be completed no later than by 12:00 p.m. (Noon) the following business day. Service information continued on attached service list.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on March 14, 2016, at Irvine, CA.

/s/ Jess Ramos

Jess Ramos

SERVICE LIST

VICTORIA A. AMELINA, et al. vs. MANUFACTURERS and
TRADERS TRUST COMPANY, et al.

Case No. 14CV1906-WQH-NLS

I. SERVED ELECTRONICALLY VIA NEF

Jessica R.K. Dorman, Esq.
Robert L. Hyde, Esq.
Hyde & Swigart
2221 Camino Del Rio South, Suite 101
San Diego, CA 92108
Email: Jessica@westcoastlitigation.com
Email: bob@westcoastlitigation.com

Abbas Kazerounian, Esq.
Kazerouni Law Group, APC
Patricia L. Penny, Esq.
Wright, Finlay & Zak, LLP
4665 MacArthur Court, Suite 200
Newport Beach, CA 92660
Email: ak@kazlg.com

[Attorneys for Plaintiffs]

II. SERVED ELECTRONICALLY VIA NEF

Kimberly D. Howatt, Esq.
Roger M. Mansukhani, Esq.
GORDON & REES LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101
Email: khowatt@gordonrees.com
Email: rmansukhani@gordonrees.com

[Attorneys for Defendant SAFEGUARD PROPERTIES, LLC.]

III. SERVED ELECTRONICALLY VIA NEF

Robin P. Wright, Esq.
Patricia L. Penny, Esq.
WRIGHT, FINLAY & ZAK, LLP
4665 MacArthur Court, Suite 280
Newport Beach, CA 92660
Email: rwright@wrightlegal.net
Email: ppenny@wrightlegal.net

[Attorneys for Defendant M&T Bank]

1 **IV. SERVED VIA OVERNIGHT MAIL**

2 Honorable Judge William Q. Hayes
3 United States District Court Southern District
4 Courtroom 14B (14th Floor- Annex)
5 Suite 1480
6 333 West Broadway
7 San Diego, CA 92101

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28